

DISTRICT OF COLUMBIA
Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

ARTHUR S. LINDE
Respondent

Case No.: I-00-10004

FINAL ORDER

I. Statement of the Case and Prior Proceedings

The Respondent in this matter, Arthur Linde, was initially issued a Notice of Infraction on February 8, 2000 charging him with violating 21 DCMR 502.1 for failing to obtain a permit and necessary approvals before engaging in land disturbing activities on a property located at the corner of 11th and W Streets, N.W. on January 24, 2000. Respondent failed to answer the Notice of Infraction within the time period permitted by law, and a default order was issued on March 9, 2000. Respondent was assessed the statutory penalty of \$500.00 as provided for under D.C. Code § 6-2704(a)(2)(A) and § 6-2712(f). Subsequent to the default, Respondent filed an untimely answer to the infraction and entered a plea of Deny. By order of March 13, 2000, the administrative court vacated the default but left in place the statutory penalty. A new hearing date was scheduled and Respondent was notified of that date by certified mail.

The charging inspector, Peter Nwangwu, appeared at the hearing on behalf of the Government together with his supervisor, Collin Burrell. The inspector and his supervisor were fully prepared to proceed with an evidentiary hearing on the merits as required by the Order of March 13, 2000. The Docket Clerk attempted unsuccessfully to contact Respondent by telephone prior to the commencement of the hearing. After waiting nearly 30 minutes, the administrative court found that the Respondent had failed to appear without demonstrating good cause and ruled that the hearing should proceed on the merits pursuant to D.C. Code 6-2713(b).

The Government proceeded to put on its case, consisting of sworn eyewitness testimony and the submission of documentary and photographic evidence that was admitted and made a part of the record. As explained below, based on the evidence admitted at the hearing, the administrative court finds that the Government has proven by a preponderance of the evidence that the Respondent is liable for the charged infraction. Respondent also remains liable for the statutory penalty assessed under D.C. Code § 6-2704(a)(2)(A) for failing to timely answer the Notice of Infraction.

II. Record Evidence and Findings of Fact

Based on the record evidence admitted at the hearing of this matter¹, including documents, photographs, sworn testimony, as well as the presiding administrative law judge's

¹ The Government submitted four photographs, which were admitted into evidence as PX-1, PX-2, PX-3, and PX-4. Separate business licensure documents were collectively admitted into evidence as PX-5. The photographs were labeled with the dates of 1/24/00, 2/23/00, 3/24/00 and 3/24/00, respectively.

assessment of the credibility of the testifying witnesses, the administrative court makes the following findings of fact:

1. On or about January 24, 2000, a large pile of excavated soil was located on a vacant lot located at the intersection of 11th and W Streets, N.W. The site was identified as 1105 W Street (“the property” or “the site”), which is located in or about the Columbia Heights neighborhood in the District of Columbia. PX-1.
2. As of January 24, 2000, no permit had been obtained from the District of Columbia Government authorizing the placement of excavated soil on the property or other land disturbing activities. Soil erosion prevention techniques had not been applied to the site, and the Department of Health had not approved any soil erosion prevention plan for the site as is required by 21 DCMR 502.1. The charging inspector testified to the absence of a permit and soil erosion plan. I credit his testimony on these points. The disturbance of the soil was clearly demonstrated through an authenticated photograph of the property and I find that the disturbance existed at the subject property on the date charged in the Notice of Infraction.
3. The property is owned by a holding company identified as A&B Holdings L.L.C. (“A&B”). Respondent Arthur Linde controls the property and is designated in the publicly filed articles of organization as its sole authorized agent. On about January 24, 2000, Inspector Nwangwu observed a commercial identification sign for the firm Eric Colbert and Associates Architects posted on the property. Through his testimony regarding telephone interviews with a representative of Eric Colbert and Associates, the charging inspector established that it is

Respondent Linde who controls and is responsible for maintaining and authorizing use of site and construction activity on it. PX-1. The presence of a commercial architecture firm's identification sign mounted on a temporary construction fence and Inspector Nwangwu's testimony regarding his interviews with that architecture firm, Eric Colbert and Associates, all support a finding that Respondent was engaged in land disturbing activities on the property or authorized others to do so.

4. Respondent did not abate the unlawful condition on the property for at least 60 days following the date of the infraction. Exhibits PX-1 through PX-4 show that soil continued to be dumped on Respondent's property without an approved soil erosion plan. Inspector Nwangwu presented authenticated photographs that were admitted into evidence showing persistent soil disturbance on the site, supporting a finding that Respondent had not remediated the violation after issuance of the Notice of Infraction. PX-2, PX-3 and PX-4. Moreover, the inspector testified that he had observed the unlawful condition on the property prior to January 24, 2000.
5. The Government served Respondent with Notice of Infraction No. 00-10004 on February 8, 2000. Respondent was served with a default notice by certified U.S. Mail (P-264-990-478) on March 9, 2000 and signed a proof of receipt on March 10, 2000, which is hereby admitted into evidence. Respondent filed an untimely answer and plea to the Notice of Infraction with the administrative court on March 10, 2000.
6. On March 13, 2000, Respondent received the administrative court's Order scheduling the hearing in this matter for March 28, 2000, by Certified U.S. Mail

(7099-3400-0002-0306-6773). A proof of receipt was received by the administrative court and filed on March 17, 2000, which is hereby admitted into evidence.

III. Analysis and Conclusions of Law

It is first necessary to address whether Mr. Linde is an appropriate respondent in this matter, given that the subject property is held by a corporate entity rather than Mr. Linde in his personal capacity. The administrative court concludes that he is an appropriate Respondent.

The regulation at issue, 21 DCMR 502.1, prohibits any person from engaging in unlawful land disturbing activities. The regulation does not restrict itself to landowners. The broad protective and remedial structure of the District of Columbia's environmental regulations is intended to promote soil conservation and minimize erosion. These regulations reach all culpable parties who engage in or authorize unlawful conduct that threatens the environment. 16 DCMR 3201.4; 21 DCMR 500.2(a)-(e). These regulations are part of a broad environmental enforcement scheme recognizing that culpable contractors, agents, architects and others with control of a parcel of property must be held liable for unlawful conduct, without regard to legal formalisms. This approach to regulatory construction is well-accepted in the field of environmental protection. For example, in *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, 195 F.3d 953 at 955 (7th Cir. 1999), the court held that a corporate shareholder agent or other individual officer with responsibility for polluting activities at a facility may be held personally liable despite the existence of a business entity as owner. The court recognized that the doctrine of limited liability is designed to shield agents, officers and shareholders from liability for

corporate debts and vicarious tort liability; it does not shield them from criminal and regulatory liability connected with their unlawful acts or omissions. Environmental regulatory cases place liability on both individuals and corporations and do not exclude corporate officers, employees or agents. *Id.* This approach is consistent with the remedial purposes, deterrence objectives, and express language of the regulations at issue in this case. 16 DCMR 3201.4; 21 DCMR 500.2; 21 DCMR 502.1. See also, *Browning-Ferris* 195 F.3d 953 at 955; *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986).

The Government has proven by a preponderance of the evidence that Respondent Arthur Linde exercised control over the property, that the Respondent allowed land disturbing activities on the property by deposition of soil that was determined to have occurred on or before January 24, 2000, and that he did not remediate these conditions for 60 days or more thereafter. Moreover, it has proven that such activities were not authorized under a duly issued governmental permit. In finding that Respondent Linde exercised control and is liable for the land disturbing activities that were proven at the hearing, I assign particular weight to the Respondent's identification as the sole agent for A&B Holdings, the statements of Eric Colbert and Associates obtained by the charging inspector, and the depiction of physical conditions evidencing at least some level of organized construction activity contained in PX-1.²

² Although the evidence in the matter was sufficient standing alone, to support the administrative court's findings and conclusions, I also draw an adverse inference from the fact that Respondent Linde failed to appear at a hearing that he requested without demonstrating good cause or any cause to excuse this disruptive conduct.

Respondent Linde was properly notified of his right to a hearing and the date of the hearing itself, both through the Notice of Infraction itself and by means of the hearing order issued by this administrative court, and served by certified mail and verified as received. Having been given adequate notice of the hearing that he requested, Respondent's failure to appear without explanation at the hearing can only be construed as a knowing and voluntary waiver and also operates as a forfeiture of the right to appear. D.C. Code § 6-2713(b); *Pearl v. Keystone Consol. Indus.*, 884 F.2d 1047 (7th Cir. 1989). *See also*, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895 (1991) (Scalia J. concurring) (discussing distinctions between waiver and forfeiture of rights); *United States v. Olano*, 507 U.S. 725, 733 (1993); *People v. Thomas*, 424 N.E.2d 537, 539-40 (N.Y. 1981); *People v. Stevens*, 553 N.Y.S.2d 44 (N.Y. App. 1990); *Hamilton v. Atlas Turner, Inc.* 197 F.3d 5861 (2d Cir. 1999).

Based on the evidence and testimony presented by the Government in this matter, the administrative court concludes that the Respondent is liable for the violation of 21 DCMR 502.1 for failing to obtain a permit before engaging in land disturbing activities and has demonstrated no basis for a downward adjustment of the fine on the record presented which reflects a history of non-compliance, a failure to promptly remediate and a failure to take responsibility for his conduct. The Respondent, having failed to show good cause, shall also be assessed the statutory penalty for failure to respond to the Notice of Infraction within the statutory time period. D.C. Code § 6-2712(e)-(f).

Now therefore, upon the evidence and arguments presented at the trial of this matter, the findings of fact made on the record, and the entire record in this case, it is hereby, this _____ day of _____, 2001:

ORDERED, that Respondent having failed to show good cause, remains liable for the previously ordered statutory penalty of \$500.00 pursuant to D.C. Code §§ 6-2712(e)-(f) and 6-2704(a)(2)(A) for failing to respond to the Notice of Infraction within the time period required by law; and it is further

ORDERED, that Respondent is assessed a fine specified by the Notice of Infraction for a violation of 21 DCMR 502.1 in the amount of \$500.00 for failing to obtain a permit before engaging in land disturbing activities; and it is further

ORDERED, that Respondent shall pay a total of **ONE THOUSAND DOLLARS (\$1,000.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real or personal property owned by Respondent pursuant to D.C. Code § 6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ 8/6/01

Paul Klein
Chief Administrative Law Judge